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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1940**

**No. —**

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**THE A. S. KREIDER COMPANY**

## **PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled cause on December 17, 1940.

### **OPINIONS BELOW**

The first opinion of the District Court (R. 25-26) is reported in 30 F. Supp. 722. The opinions in the Circuit Court of Appeals on the first appeal (R. 27-33) are reported in 97 F. (2d) 387. The second opinion of the District Court (R. 34-37) is reported in 30 F. Supp. 724. The opinion of the Circuit Court of Appeals on the second appeal (R. 41-46) is not yet reported.



**JURISDICTION**

The judgment of the court below was entered on December 17, 1940. (R. 47.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTIONS PRESENTED**

During the year 1921 the taxpayer paid its income taxes for the year 1920. In 1926, it made a small additional payment in respect of its 1920 taxes. In 1929, it filed a claim for refund of all of its 1920 taxes. The questions presented are:

1. Whether, under Section 284 (b) (2) and (g) of the Revenue Act of 1926, the claim for refund which would otherwise be untimely as to the payments made in 1921 is timely with respect thereto merely because of its timeliness with respect to the 1926 payment.
2. Whether, in any event, even if the claim were timely, this suit, instituted in 1932, has been brought too late. The answer to this question depends in part upon whether the general six-year period of limitations in the Tucker Act must be read as superseding the comprehensive scheme of limitations with respect to taxes set forth in Revised Statutes, Section 3226.]

**STATUTES INVOLVED**

The statutes involved are set forth in the Appendix, *infra*, pp. 15-19.

## STATEMENT

The taxpayer began this suit in the District Court on March 7, 1932 to recover income taxes for the year 1920. (R. 3.) A judgment in favor of the Government on the ground that the suit was barred by the statute of limitations (R. 25-26) was reversed by a majority of the court below, Judge Biggs dissenting, and the case was remanded to the District Court (R. 27-33). The Government renewed its contention that the suit had been barred, and argued further, *inter alia*, that the claim for refund upon which the suit was predicated was not timely. The District Court entered judgment for the taxpayer (R. 34-38), which was thereupon affirmed by the court below (R. 41-47). The facts may be summarized as follows:

The taxpayer, a Pennsylvania corporation, filed its 1920 income tax return on March 15, 1921, disclosing a total tax liability in the amount of \$52,481.97, which it paid in four installments in 1921. (R. 3-4.)

On April 10, 1926 the Commissioner of Internal Revenue advised the taxpayer of a \$1,362.50 deficiency for the year 1920. The taxpayer had executed a waiver extending the period of limitations for assessment of its 1920 taxes to December 31, 1926. (R. 4.)

The taxpayer paid the deficiency on July 28, 1926, and on or about March 23, 1929 filed a claim



for refund of *all* of the taxes for the year 1920.  
(R. 4.)

On September 9, 1929, the Commissioner signed a schedule of overassessment, and in October, 1929 mailed to the taxpayer a certificate of overassessment showing \$1,362.50 as the net amount refundable with interest and enclosing a check therefor.  
(R. 4, 11, 19-24, 26.)

The certificate of overassessment disclosed the following (R. 19):

Tax assessed:

Original, Account No. 422,472.....	\$52,481.97
Additional July 1926, Page 1, Line 5.....	1,362.50
<hr/>	
Total Assessment.....	\$53,844.47
Correct tax liability.....	39,010.79
<hr/>	
Overassessment.....	\$14,833.68
Barred by Statute of Limitations.....	13,471.18
<hr/>	
Overassessment allowable.....	\$1,362.50

The Commissioner therefore refunded to the taxpayer the additional tax paid within four years from the date of filing the claim for refund but denied a refund of the original 1920 tax paid in 1921 as not refundable by reason of the limitation of Section 284 of the Revenue Act of 1926. (R. 19.)

Upon the taxpayer's filing of this suit for refund in 1932, the Government contended and the District Court held that this suit is not maintainable since, under Revised Statutes, Section 3226, it was brought more than two years after the dis-

allowance of the claim for refund, and more than five years after any payment of taxes for the year in question. The Circuit Court of Appeals reversed, holding that the general six year period of limitations in the Tucker Act was applicable, and that the small additional payment in 1926, even though actually refunded, kept alive for six years thereafter the right to sue for refund of an overpayment made some years before in 1921.

Upon remand to the District Court, the Government not only attacked the decision of the court below, but contended further that in any event the claim for refund filed in 1929 could not, under Section 284 (b) (2) and (g) of the Revenue Act of 1926, support a suit for refund of the taxes paid in 1921. The judgment of the District Court against the Government was affirmed by the court below.

In this Court, the Government now seeks review of the results reached by the court below on both appeals.

#### **SPECIFICATION OF ERRORS TO BE URGED**

The court below erred:

1. In holding that, under the provisions of Section 284 (g) of the Revenue Act of 1926, a refund claim filed within four years of a 1926 payment is a sufficient basis for a suit to recover the original tax paid in 1921.
2. In holding that the Tucker Act (Section 24 (20) of the Judicial Code, as amended) amended

Section 3226 of the Revised Statutes and authorized a suit in 1932 to recover taxes paid in 1921.

3. In holding that there was no rejection of the claim for refund and that therefore the two year limitation on suits provided by Section 3226 of the Revised Statutes, as amended, was not applicable.

4. In holding that the five year limitation on suits provided by Section 3226 of the Revised Statutes, as amended, was not applicable.

5. In holding that the District Court had jurisdiction to entertain this suit.

6. In affirming the decision of the District Court entering judgment for the taxpayer.

#### REASONS FOR GRANTING THE WRIT

Two important questions are here presented, on one of which there is a direct conflict.

The tax year here involved is the calendar year 1920, and the taxes in the amount of \$13,471.18 which respondent seeks to recover were paid in 1921. The claim for refund upon which this suit is founded was filed in March 1929, and was disallowed during the same year. The claim was allowed to the extent of \$1,362.50 which respondent had paid during the year 1926 as a deficiency; and the disallowance of the larger amount sought in this proceeding was on the ground that the statute of limitations had run. This suit for refund was brought March 7, 1932, more than two years after such disallowance.

In opposing the maintenance of this suit, two major issues are raised: first, that when respondent filed its claim for refund in 1929, the time within which it could have filed a claim for refund of taxes paid in 1921 had already elapsed; and, second, even if the 1929 claim were timely, this suit, instituted in 1932, was brought too late.

1. *The 1929 claim for refund was untimely.* The applicable statutory provisions are contained in the Revenue Act of 1926, which undertook not only to specify the limitations periods for taxes imposed by that Act, but also codified the limitations periods for taxes imposed by prior revenue acts.

Section 284 (b) (1) of the 1926 Act provides that "No \* \* \* refund shall be \* \* \* made \* \* \* after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer." And Section 284 (g) of the 1926 Act extends the period in any event to April 1, 1927 in a case where the taxpayer has filed a waiver on or before June 15, 1926:

If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed



either on or before April 1, 1927, or within four years from the time the tax was paid.

Thus, since respondent did file a waiver prior to June 15, 1926 (R. 4, 5), it had at least until April 1, 1927 within which to file a claim for refund of its 1920 taxes. But since it had paid those taxes in 1921, it would seem equally plain that it could not file a claim for refund after April 1, 1927.

Respondent's sole attempt to escape the consequences of these provisions lies in the fact that it paid \$1,362.50 in 1926 as a deficiency upon its 1920 income, and it contends that such additional payment started anew the running of the four year period within which it could file a claim for refund. The Commissioner recognized the respondent's right to seek refund in 1929 to the extent of the payment made in 1926, but ruled that such payment could not extend the time within which respondent could seek refund of the taxes actually paid in 1921.

It seems quite plain that Congress could not have intended to permit a taxpayer to extend the period of limitations by making a relatively small additional payment at a time when the period is about to expire. And whatever doubt there may have been on this question is dispelled by Section 284 (b) (2) of the 1926 Act which unambiguously provides:

The amount of the \* \* \* refund shall not exceed the portion of the tax paid

during the \* \* \* four years \* \* \*  
immediately preceding the filing of the  
claim \* \* \*.

The court below refused to apply these provisions, stating that although they were a limitation upon Section 284 (b) (1), they did not affect Section 284 (g). In so holding, the decision below is in direct conflict with *Weinburg v. United States*, 25 F. Supp. 83 (C. Cls.), certiorari denied, 306 U. S. 661,<sup>1</sup> where the opposite result was reached in construing the identical statutory provisions. See also *Straus v. United States*, 25 F. Supp. 88 (C. Cls.), certiorari denied, 306 U. S. 661.

2. In any event, even if the 1929 claim were timely as to the taxes paid in 1921, this suit was brought too late. The claim for refund was disallowed in 1929, and this suit was instituted March 7, 1932. But Revised Statutes, Section 3226, as reenacted by Section 1113 (a) of the Revenue Act

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<sup>1</sup> The court below did not attempt to distinguish the *Weinburg* case; nor did it even mention that case, notwithstanding that the Government placed its primary reliance upon the *Weinburg* decision on this branch of the case. However, the *Weinburg* decision is referred to in the second opinion of the District Court (R. 36), and was rejected upon the ground that the Court of Claims had invoked the legislative history of a different statute in construing the applicable provisions. Thus, not only does the District Court's decision run squarely contrary to the *Weinburg* decision, but the reason it gave for refusing to follow that decision is specious, for the legislative history related to the substantially identical provisions in a prior revenue act that were simply reenacted in the Revenue Act of 1926, the statute here involved.



of 1926, Appendix, *infra*, p. 17, provides that in the case of any internal revenue tax alleged to have been illegally collected no suit or proceeding for refund shall be begun " \* \* \* after the expiration of five years from the date of the payment of such tax \* \* \* unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates."

This suit, however, was not brought either within five years of payment or within two years of disallowance.<sup>2</sup> For, even if the payment of the deficiency in 1926 which was later refunded be regarded as "the payment of such tax" under Section 3226, this suit was brought more than five years after such payment, and it was brought more than two years after the 1929 disallowance of the claim.

The court below was able to circumvent the effect of these provisions only by relying upon the general six-year period of limitations contained in the Tucker Act (Section 24 (20) of the Judicial Code), and held that, since this suit was brought within six years of the 1926 payment,

<sup>2</sup> It seems quite plain that the Commissioner's refusal to refund any amount in excess of the 1926 payment constituted a disallowance as to the remainder, and the court below so treated it on the first appeal. (R. 29.) Although the court on the second appeal refused to consider the question of the timeliness of the suit (R. 43), it did seem to say, erroneously, we believe, that the claim for refund was not disallowed by the Commissioner (R. 46).

the taxpayer could now recover taxes paid in 1921.<sup>3</sup>

The Tucker Act is the general statute which authorizes suits against the United States both in the Court of Claims and in the district courts. In general language, it states that "No suit \* \* \* shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made." In 1921, it was amended by Section 1310 (c) of the Revenue Act of 1921 to extend the jurisdiction of the district courts to tax claims above \$10,000 where the collector who collected the tax was dead at the time the suit

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<sup>3</sup> That result was reached by a majority of the court below (Judges Thompson and Buffington) over the dissent of Judge Biggs, when this case was before the court on the first appeal. (R. 27-33.) In view of the fact that the case was remanded to the District Court for further proceedings, the Government regarded the judgment of the Circuit Court of Appeals as interlocutory in character, and for that reason refrained from petitioning for certiorari at that time. It is clear that the question is now open. Cf. *Hamilton Shoe Co. v. Wolf Brothers*, 240 U. S. 251, 258; *Smith v. McCullough*, 270 U. S. 456, 461. See discussion by Judge Magruder in *White v. Higgins*, 116 F. (2d) 312, 317 (C. C. A. 1st).

Judge Biggs' dissent was upon the ground that the taxpayer's cause of action really rested upon an account stated, and that it had not only failed to make out a case thereon, but also that it should have brought suit in the Court of Claims rather than in the District Court. If certiorari is granted, we intend to urge those considerations as additional alternative reasons for reversing the judgment below.

was brought. But there was not the slightest indication that Congress intended the comprehensive limitations provisions relating to taxes set forth in Revised Statutes, Section 3226, to be superseded by the general six-year provision in the Tucker Act.<sup>4</sup> Indeed, Section 3226 was itself likewise amended in certain particulars by the Revenue Act of 1921 (Section 1318); and had Congress understood the Tucker Act as limiting the provisions of Section 3226, it plainly would have so indicated at that time. But more than that, Section 3226 was further reenacted by the Revenue Act of 1926, and Congress again set forth the comprehensive limitations provisions relating to taxes, without any recognition of the possibility that those provisions had been superseded some years prior thereto by the Tucker Act in respect of suits against the United States for refund of taxes. And Section 3226 has been judicially regarded as specifying the limitations period for suits for refund of taxes. *Stearns Co.*

<sup>4</sup> Even under the theory that the Tucker Act applies, the decision below is wrong, because the suit filed in 1932 was begun more than six years "after the right accrued." The 1926 overpayment has already been refunded to the taxpayer, and it seeks refund now only with respect to an alleged overpayment made in 1921. Accordingly, the right in respect of which the taxpayer seeks refund "accrued" in 1921, and this suit was instituted about eleven years thereafter. Of course, if the taxpayer's action is grounded upon an "account stated" the right probably "accrued" on the date of the issuance of the certificate of overassessment; but in that event, this proceeding would be fatally defective for the reasons stated by Judge Biggs (R. 30).

*v. United States*, 291 U. S. 54, 65; *United States v. Michel*, 282 U. S. 656; *Savannah Bank & Trust Co. v. United States*, 58 F. (2d) 1068 (C. Cls.).<sup>5</sup>

Moreover, since Section 3226 applies to all suits for refund of taxes, to suits against collectors as well as suits against the United States, a most anomalous result would follow from the decision below. Under the court's decision, a six-year period would be applicable to suits against the United States, whereas the five-year period would continue to apply to suits against collectors. These absurd consequences emphasize the seriousness of the error committed by the court.

We respectfully submit that in holding that the comprehensive statutory provisions governing the limitations periods for suits to recover federal taxes have been impliedly superseded by the general six-year period in the Tucker Act, the court below has decided a question of great importance in the administration of the tax laws which should be re-

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<sup>5</sup> In taking a contrary view the court below relied upon *Bates Mfg. Co. v. United States*, 303 U. S. 567. But that case did not raise the question whether the Tucker Act had amended Section 3226. It involved merely the question of when a suit was begun, and this Court held that the date of the filing of the petition controlled rather than the date of service of the petition. The Tucker Act, of course, furnishes the statutory basis for suits against the United States, and the Court in the *Bates* case correctly considered the issue as one of determining whether the conditions specified in the Tucker Act had been complied with. Here, however, Section 3226 superimposes additional requirements with respect to federal taxes, and the only question is whether those additional requirements shall be given effect.



viewed by this Court. Indeed, this question is perhaps even more important than the first question presented, and if certiorari is granted with respect to the first question the writ should include the second as well.

#### CONCLUSION

Because of the conflict with the *Weinburg* case on the construction of Section 284 of the Revenue Act of 1926, and the importance, in all federal tax litigation, of whether the Tucker Act extends beyond the provisions of Revised Statutes, Section 3226, the period for bringing suit, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,  
*Solicitor General.*

MARCH, 1941.

## APPENDIX

### Revenue Act of 1926, c. 27, 44 Stat. 9:

#### CREDITS AND REFUNDS

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and



(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period

thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919, or on or before April 1, 1928, in the case of credits or refunds relating to the taxes for the taxable years 1920 and 1921. This subdivision shall not authorize a credit or refund prohibited by the provisions of subdivision (d).

\* \* \* \* \*

#### LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER

**SEC. 1113.** (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

“SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding

may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail." [U. S. C., Title 26, Sec. 1672.]

\* \* \* \* \*

#### Judicial Code:

SEC. 24. The district courts shall have original jurisdiction as follows:

\* \* \* \* \*

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding \$10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and

of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds \$10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. \* \* \* No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. \* \* \* [U. S. C., Title 28, Sec. 41.]